

EXHIBIT B

WIPO

WORLD INTELLECTUAL PROPERTY ORGANIZATION

WIPO-Administered Treaties

Contracting Parties > Berne Convention (Total Contracting Parties : 174)

Contracting Party	Signature	Instrument	In Force	Details
Albania		Accession: December 2, 1993	March 6, 1994	Details
Algeria		Accession: January 19, 1998	April 19, 1998	Details
Andorra		Accession: March 2, 2004	June 2, 2004	Details
Antigua and Barbuda		Accession: December 17, 1999	March 17, 2000	Details
Argentina		Accession: May 5, 1967	June 10, 1967	Details
Armenia		Accession: July 19, 2000	October 19, 2000	Details
Australia		Declaration of Continued Application: April 14, 1928	April 14, 1928	Details
Austria		Accession: September 11, 1920	October 1, 1920	Details
Azerbaijan		Accession: March 4, 1999	June 4, 1999	Details
Bahamas		Declaration of Continued Application: July 5, 1976	July 10, 1973	Details
Bahrain		Accession: November 29, 1996	March 2, 1997	Details
Bangladesh		Accession: February 4, 1999	May 4, 1999	Details
Barbados		Accession: March 16, 1983	July 30, 1983	Details
Belarus		Accession: September 12, 1997	December 12, 1997	Details
Belgium	September 9, 1886	Ratification: September 5, 1887	December 5, 1887	Details
Belize		Accession: March 17, 2000	June 17, 2000	Details
Benin		Declaration of Continued Application: January 3, 1961	August 1, 1960	Details
Bhutan		Accession: August 25, 2004	November 25, 2004	Details
Bolivia (Plurinational State of)		Accession: August 4, 1993	November 4, 1993	Details
Bosnia and Herzegovina		Declaration of Continued Application: June 2, 1993	March 1, 1992	Details

Botswana		Accession: January 15, 1998	April 15, 1998	Details
Brazil		Accession: February 6, 1922	February 9, 1922	Details
Brunei Darussalam		Accession: May 30, 2006	August 30, 2006	Details
Bulgaria		Accession: December 5, 1921	December 5, 1921	Details
Burkina Faso		Accession: April 26, 1963	August 19, 1963	Details
Burundi		Accession: January 12, 2016	April 12, 2016	Details
Cabo Verde		Accession: April 7, 1997	July 7, 1997	Details
Cameroon		Declaration of Continued Application: September 21, 1964	January 1, 1960	Details
Canada		Declaration of Continued Application: April 10, 1928	April 10, 1928	Details
Central African Republic		Accession: May 31, 1977	September 3, 1977	Details
Chad		Accession: August 4, 1971	November 25, 1971	Details
Chile		Accession: April 9, 1970	June 5, 1970	Details
China		Accession: July 10, 1992	October 15, 1992	Details
Colombia		Accession: December 4, 1987	March 7, 1988	Details
Comoros		Accession: January 17, 2005	April 17, 2005	Details
Congo		Declaration of Continued Application: May 8, 1962	August 15, 1960	Details
Cook Islands		Accession: May 3, 2017	August 3, 2017	Details
Costa Rica		Accession: March 3, 1978	June 10, 1978	Details
Côte d'Ivoire		Accession: July 8, 1961	January 1, 1962	Details
Croatia		Declaration / Notification of Succession: July 28, 1992	October 8, 1991	Details
Cuba		Accession: November 20, 1996	February 20, 1997	Details
Cyprus		Declaration of Continued	August 16, 1960	Details

		Application: February 24, 1964		
Czech Republic		Declaration of Continued Application: December 18, 1992	January 1, 1993	Details
Democratic People's Republic of Korea		Accession: January 28, 2003	April 28, 2003	Details
Democratic Republic of the Congo		Declaration of Continued Application: October 8, 1963	June 30, 1960	Details
Denmark		Accession: June 13, 1903	July 1, 1903	Details
Djibouti		Accession: February 13, 2002	May 13, 2002	Details
Dominica		Accession: May 7, 1999	August 7, 1999	Details
Dominican Republic		Accession: September 24, 1997	December 24, 1997	Details
Ecuador		Accession: July 8, 1991	October 9, 1991	Details
Egypt		Accession: March 2, 1977	June 7, 1977	Details
El Salvador		Accession: November 18, 1993	February 19, 1994	Details
Equatorial Guinea		Accession: March 26, 1997	June 26, 1997	Details
Estonia		Accession: July 26, 1994	October 26, 1994	Details
Fiji		Declaration of Continued Application: December 1, 1971	October 10, 1970	Details
Finland		Accession: March 23, 1928	April 1, 1928	Details
France	September 9, 1886	Ratification: September 5, 1887	December 5, 1887	Details
Gabon		Accession: December 19, 1961	March 26, 1962	Details
Gambia		Accession: December 7, 1992	March 7, 1993	Details
Georgia		Accession: February 16, 1995	May 16, 1995	Details
Germany	September 9, 1886	Ratification: September 5, 1887	December 5, 1887	Details

Ghana		Accession: July 11, 1991	October 11, 1991	Details
Greece		Accession: November 9, 1920	November 9, 1920	Details
Grenada		Accession: June 22, 1998	September 22, 1998	Details
Guatemala		Accession: April 28, 1997	July 28, 1997	Details
Guinea		Accession: August 13, 1980	November 20, 1980	Details
Guinea-Bissau		Accession: April 18, 1991	July 22, 1991	Details
Guyana		Accession: July 25, 1994	October 25, 1994	Details
Haiti		Accession: October 11, 1995	January 11, 1996	Details
Holy See		Accession: July 19, 1935	September 12, 1935	Details
Honduras		Accession: October 24, 1989	January 25, 1990	Details
Hungary		Accession: February 14, 1922	February 14, 1922	Details
Iceland		Accession: June 30, 1947	September 7, 1947	Details
India		Declaration of Continued Application: April 23, 1928	April 1, 1928	Details
Indonesia		Accession: June 5, 1997	September 5, 1997	Details
Ireland		Accession: October 5, 1927	October 5, 1927	Details
Israel		Accession: December 14, 1949	March 24, 1950	Details
Italy	September 9, 1886	Ratification: September 5, 1887	December 5, 1887	Details
Jamaica		Accession: September 28, 1993	January 1, 1994	Details
Japan		Accession: April 18, 1899	July 15, 1899	Details
Jordan		Accession: April 28, 1999	July 28, 1999	Details
Kazakhstan		Accession: January 12, 1999	April 12, 1999	Details
Kenya		Accession: March 11, 1993	June 11, 1993	Details

Kuwait		Accession: September 2, 2014	December 2, 2014	Details
Kyrgyzstan		Accession: April 8, 1999	July 8, 1999	Details
Lao People's Democratic Republic		Accession: December 14, 2011	March 14, 2012	Details
Latvia		Accession: May 11, 1995	August 11, 1995	Details
Lebanon		Accession: February 19, 1946	September 30, 1947	Details
Lesotho		Accession: June 27, 1989	September 28, 1989	Details
Liberia		Accession: December 8, 1988	March 8, 1989	Details
Libya		Accession: June 28, 1976	September 28, 1976	Details
Liechtenstein		Accession: July 20, 1931	July 30, 1931	Details
Lithuania		Accession: September 14, 1994	December 14, 1994	Details
Luxembourg		Accession: June 20, 1888	June 20, 1888	Details
Madagascar		Declaration of Continued Application: February 11, 1966	January 1, 1966	Details
Malawi		Accession: July 12, 1991	October 12, 1991	Details
Malaysia		Accession: June 28, 1990	October 1, 1990	Details
Mali		Declaration of Continued Application: March 19, 1962	March 19, 1962	Details
Malta		Declaration of Continued Application: May 29, 1968	September 21, 1964	Details
Mauritania		Accession: October 16, 1972	February 6, 1973	Details
Mauritius		Accession: February 9, 1989	May 10, 1989	Details
Mexico		Accession: May 9, 1967	June 11, 1967	Details
Micronesia (Federated States of)		Accession: July 7, 2003	October 7, 2003	Details
Monaco		Accession: May 30, 1889	May 30, 1889	Details

Mongolia		Accession: December 12, 1997	March 12, 1998	Details
Montenegro		Declaration of Continued Application: December 4, 2006	June 3, 2006	Details
Morocco		Accession: June 16, 1917	June 16, 1917	Details
Mozambique		Accession: August 22, 2013	November 22, 2013	Details
Namibia		Declaration of Continued Application: September 21, 1993	March 21, 1990	Details
Nepal		Accession: October 11, 2005	January 11, 2006	Details
Netherlands		Accession: October 9, 1912	November 1, 1912	Details
New Zealand		Declaration of Continued Application: April 26, 1928	April 24, 1928	Details
Nicaragua		Accession: May 23, 2000	August 23, 2000	Details
Niger		Declaration of Continued Application: May 2, 1962	August 3, 1960	Details
Nigeria		Accession: June 10, 1993	September 14, 1993	Details
Niue		Accession: June 24, 2016	September 24, 2016	Details
Norway		Accession: April 13, 1896	April 13, 1896	Details
Oman		Accession: April 14, 1999	July 14, 1999	Details
Pakistan		Accession: June 4, 1948	July 5, 1948	Details
Panama		Accession: March 8, 1996	June 8, 1996	Details
Paraguay		Accession: September 9, 1991	January 2, 1992	Details
Peru		Accession: May 20, 1988	August 20, 1988	Details
Philippines		Accession: June 29, 1950	August 1, 1951	Details
Poland		Accession: January 28, 1920	January 28, 1920	Details
Portugal		Accession: March 29, 1911	March 29, 1911	Details

Qatar		Accession: April 5, 2000	July 5, 2000	Details
Republic of Korea		Accession: May 21, 1996	August 21, 1996	Details
Republic of Moldova		Accession: August 1, 1995	November 2, 1995	Details
Romania		Accession: August 28, 1926	January 1, 1927	Details
Russian Federation		Accession: December 9, 1994	March 13, 1995	Details
Rwanda		Accession: November 3, 1983	March 1, 1984	Details
Saint Kitts and Nevis		Accession: January 3, 1995	April 9, 1995	Details
Saint Lucia		Accession: May 21, 1993	August 24, 1993	Details
Saint Vincent and the Grenadines		Accession: May 29, 1995	August 29, 1995	Details
Samoa		Accession: April 21, 2006	July 21, 2006	Details
Sao Tome and Principe		Accession: March 14, 2016	June 14, 2016	Details
Saudi Arabia		Accession: December 11, 2003	March 11, 2004	Details
Senegal		Accession: June 30, 1962	August 25, 1962	Details
Serbia		Declaration of Continued Application: September 19, 2006	April 27, 1992	Details
Singapore		Accession: September 21, 1998	December 21, 1998	Details
Slovakia		Declaration of Continued Application: December 30, 1992	January 1, 1993	Details
Slovenia		Declaration of Continued Application: June 12, 1992	June 25, 1991	Details
South Africa		Declaration of Continued Application: October 3, 1928	October 3, 1928	Details
Spain	September 9, 1886	Ratification: September 5, 1887	December 5, 1887	Details
Sri Lanka		Declaration of Continued Application: July 20, 1959	February 4, 1948	Details

Sudan		Accession: September 28, 2000	December 28, 2000	Details
Suriname		Accession: November 16, 1976	February 23, 1977	Details
Swaziland		Accession: September 14, 1998	December 14, 1998	Details
Sweden		Accession: July 8, 1904	August 1, 1904	Details
Switzerland	September 9, 1886	Ratification: September 5, 1887	December 5, 1887	Details
Syrian Arab Republic		Accession: March 11, 2004	June 11, 2004	Details
Tajikistan		Accession: December 9, 1999	March 9, 2000	Details
Thailand		Accession: June 17, 1931	July 17, 1931	Details
the former Yugoslav Republic of Macedonia		Declaration / Notification of Succession: July 23, 1993	September 8, 1991	Details
Togo		Accession: January 28, 1975	April 30, 1975	Details
Tonga		Accession: March 14, 2001	June 14, 2001	Details
Trinidad and Tobago		Accession: May 16, 1988	August 16, 1988	Details
Tunisia	September 9, 1886	Ratification: September 5, 1887	December 5, 1887	Details
Turkey		Accession: October 27, 1951	January 1, 1952	Details
Turkmenistan		Accession: February 29, 2016	May 29, 2016	Details
Tuvalu		Accession: March 2, 2017	June 2, 2017	Details
Ukraine		Accession: July 25, 1995	October 25, 1995	Details
United Arab Emirates		Accession: April 14, 2004	July 14, 2004	Details
United Kingdom	September 9, 1886	Ratification: September 5, 1887	December 5, 1887	Details
United Republic of Tanzania		Accession: April 25, 1994	July 25, 1994	Details

United States of America		Accession: November 16, 1988	March 1, 1989	Details
Uruguay		Accession: June 7, 1967	July 10, 1967	Details
Uzbekistan		Accession: January 19, 2005	April 19, 2005	Details
Vanuatu		Accession: September 27, 2012	December 27, 2012	Details
Venezuela (Bolivarian Republic of)		Accession: September 20, 1982	December 30, 1982	Details
Viet Nam		Accession: July 26, 2004	October 26, 2004	Details
Yemen		Accession: April 14, 2008	July 14, 2008	Details
Zambia		Accession: September 13, 1991	January 2, 1992	Details
Zimbabwe		Declaration / Notification of Succession: September 18, 1981	April 18, 1980	Details

EXHIBIT C



Intellectual Property Department
The Government of the Hong Kong Special Administrative Region



GovHK 香港政府一站通

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Releases](#)

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[Code on Access to
Information](#)

[What is Intellectual
Property?](#)

[Applying for Registration](#)

[Forms and Fees](#)

[Online Services](#)

[HK IP Journal](#)

[FAQ](#)

[IP Practitioners](#)

[Intellectual Property
Database for Guangdong,
Hong Kong and Macao](#)

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IP Cooperation Corner](#)

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[Tender Notices](#)

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[Download Area](#)

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International Agreements to which Hong Kong, China is a party

Intellectual property laws are domestic. For example, a right given under Hong Kong SAR law only applies in the Hong Kong SAR. However, various international conventions require member countries or economies to recognise rights of persons from the other member countries. The main international intellectual property conventions which have been applied to the Hong Kong SAR by the People's Republic of China are:

- the Paris Convention for the Protection of Industrial Property;
- the Berne Convention for the Protection of Literary and Artistic Works;
- the Universal Copyright Convention;
- the Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks;
- the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms;
- the Patent Cooperation Treaty;
- the Convention establishing the World Intellectual Property Organisation ("WIPO");
- the WIPO Copyright Treaty; and
- the WIPO Performances and Phonograms Treaty.

Hong Kong, China is a member of the World Trade Organisation in its own right, and our intellectual property protection system meets the standards set out in the WTO TRIPS Agreement.

[BACK](#)

[TOP](#)

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Last revision date: 27 February, 2013



EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: _____

----- X
JETMAX LIMITED,

Plaintiff,

-v-

BIG LOTS, INC., ADVANCE
INTERNATIONAL, INC. and HERBERT
FEINBERG,

Defendants.
----- X

15-cv-9597 (KBF)

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

This case centers around a copyright infringement dispute between plaintiff Jetmax Limited (“Jetmax”) and defendants Big Lots, Inc. (“Big Lots”), Advance International, Inc. (“Advance”), and Herbert Feinberg (“Feinberg”) regarding Jetmax’s Metal Wire Wrapped Tear Drop Light Set (the “Tear Drop Light Set”), the subject of U.S. Copyright Registration No. VAu 978-587 (the “587 Copyright Registration”). The Tear Drop Light Set is an ornamental light set comprised of a series of molded, decorative tear shaped covered lights with a wire frame over the covers.

Now before the Court is plaintiff’s motion for summary judgment (ECF No. 34) and defendants’ cross-motion for summary judgment (ECF No. 42). Plaintiff seeks a judgment that defendants have willfully infringed the ‘587 Copyright Registration through their sale of a substantially similar light set. (See Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment of Willful

Copyright Infringement (“Pl.’s Mem. in Supp.”), ECF No. 35, at 6.) In opposition, and in furtherance of their cross-motion, defendants argue that plaintiff does not own a valid certificate of copyright registration and that the Tear Drop Light Set is not copyrightable. (Defendants Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Defendants Cross-Motion for Summary Judgment (“Dfs.’ Mem. in Supp.”), ECF No. 42, at 4-5.) Specifically, defendants argue that the Tear Drop Light Set is not copyrightable because it is a useful article and because it lacks originality. (*Id.*)

As discussed below, the Court determines that under the Supreme Court’s recent decision in Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017), the Tear Drop Light Set contains artistic elements that “can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” See 17 U.S.C. § 101. Accordingly, the Court rejects defendants’ argument that the Tear Drop Light Set in its entirety it is not entitled to copyright protection as a useful article. The Court also finds, however, that there are genuine disputes of material fact concerning whether plaintiff owns a valid certificate of copyright registration covering the Tear Drop Light Set and whether the Tear Drop Light Set is sufficiently original to warrant copyright protection. Accordingly, plaintiff’s motion for summary judgment is DENIED and defendants’ cross-motion for summary judgment is also DENIED.

I. BACKGROUND¹

A. Factual Background

Jetmax is a Hong Kong corporation that designs, manufactures, and sells a variety of furniture, lighting, and home décor items. (Defendants Response to [sic] Jetmax Limited's Statement of Material Facts on Plaintiff's Motion for Summary Judgment ("Defs.' 56.1 Resp.") ¶¶ 1, 20, ECF No. 45.) At the heart of the instant dispute is the Tear Drop Light Set, manufactured and offered for sale by Jetmax. (Id. ¶ 32.) The Tear Drop Light set, as depicted below, is an ornamental light set comprised of a series of molded, decorative tear shaped covers with a wire frame over the covers.



Tear Drop Light Set

¹ The following facts are undisputed unless otherwise noted. See Fed. R. Civ. P. 56.

(Declaration of Reena Jain in Support of Plaintiff's Motion for Summary Judgment of Willful Copyright Infringement ("Jain Decl.") Ex. 1, ECF No. 36-1.)

The Tear Drop Light Set was designed in 2004 and has been on sale since September 2005. (Defs.' 56.1 Resp. ¶¶ 24, 32.) The set contains a string of lights that are each surrounded by a plastic, tear drop shaped, iridescent cover. The plastic covers each contain eight sets of double grooves. (Defs.' 56.1 Resp. ¶ 67.) Each cover is in turn surrounded by a wire frame comprised of eight pieces of wire that rest between the double grooves. (Defs.' 56.1 Resp. ¶ 67.) A plastic stone hangs from the tip of each wire frame. (See Jain Decl. Ex 14 at 3.)

The Tear Drop Light Set, along with seven other light sets, is the subject of the '587 Copyright Registration. (Plaintiff's Responses to Defendants' Statement of Material Facts ("Pl.'s 56.1 Resp.") ¶¶ 5-6, ECF No. 53; Defs.' 56.1 Resp. ¶ 29; see Affirmation of Harlan Lazarus in Opposition to the Plaintiff's Motion for Summary Judgment and in Support of Defendants Cross-Motion for Summary Judgment ("Lazarus Aff.") Ex. A, ECF No. 43-1.) Jetmax claims authorship of the '587 Copyright Registration, a fact that defendants dispute. (Defs.' 56.1 Resp. ¶ 30.)

Defendant Advance, a New York corporation engaged in the wholesale manufacturing industry, produced the allegedly infringing product (the "Advance Light Set"), depicted below. The Advance Light Set has been sold at defendant Big Lots's stores since early 2015. (Defs.' 56.1 Resp. ¶¶ 42-43; Pl.'s 56.1 Resp. ¶¶ 8-20.) Similar to the Tear Drop Light Set, the Advance Light Set has a teardrop shaped plastic cover with eight sets of double grooves, as well as a decorative wire frame

containing eight pieces of wire and the come together in a question mark form. (Defs.' 56.1 Resp. ¶ 67.) The Advance Light Set does not contain an ornamental dangly and the cover does not have an iridescent finish. (Pl.'s 56.1 Resp. ¶ 17.)



Advance Light Set

(Jain Decl. Ex. 2, ECF No. 36-2.)

B. Procedural Background

Plaintiff commenced this action on December 8, 2015, alleging that defendants knowingly and willfully infringed upon the '587 Copyright by producing and selling the Advance Light Set. (See Complaint, ECF No. 1.) Following the close of discovery, plaintiff moved for summary judgment on its sole claim of copyright infringement. (ECF No. 34.) Defendants opposed the motion and filed a cross-motion for summary judgment. (ECF No. 42.) In opposition to plaintiff's motion and in furtherance of their cross-motion, defendants argue that plaintiff does not own a valid certificate of copyright registration and that the Tear Drop Light Set is

not copyrightable. (Dfs.' Mem. in Supp. at 4-5.) Specifically, defendants argue that the Tear Drop Light Set is not copyrightable because it is a useful article and because it lacks originality. (*Id.*)

After the parties' motions became fully briefed, the Supreme Court issued its decision in Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017), which resolved widespread disagreement over the proper test for determining whether the design of a useful article is entitled to copyright protection under Section 101 of the Copyright Act, 17 U.S.C. § 101. Star Athletica, 137 S. Ct. at 1007. This Court requested supplemental briefing from the parties analyzing the impact, if any, of Star Athletica on the pending cross-motions for summary judgment. (ECF No. 60.) The Court received the parties' responsive submissions on August 16, 2017. (ECF Nos. 61, 62.)

II. SUMMARY JUDGMENT STANDARD

Summary judgment may not be granted unless a movant shows, based on admissible evidence in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party does not bear the ultimate burden on a particular claim or issue, it need only make a showing that the non-moving party lacks evidence from which a reasonable jury could find in the non-moving party's favor at trial. *Id.* at 322-23.

In making a determination on summary judgment, the court must “construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor.” Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010) (citing LaSalle Bank Nat’l Ass’n v. Nomura Asset Capital Corp., 424 F.3d 195, 205 (2d Cir. 2005)). Once the moving party has discharged its burden, the opposing party must set out specific facts showing a genuine issue of material fact for trial. Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). “A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment,” as “mere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist.” Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (internal quotation marks, citations, and alterations omitted).

III. DISCUSSION

Plaintiff Jetmax seeks a judgment that defendants have willfully infringed the ‘587 Copyright Registration covering the Tear Drop Light Set through their sale of the Advance Light Set. (See Pl.’s Mem. in Supp. at 6.) “To prove a claim of copyright infringement, a plaintiff must show (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original.” Urbont v. Sony Music Entm’t, 831 F.3d 80, 88 (2d Cir. 2016) (citing Boisson v. Banian, Ltd., 273 F.3d 262, 267 (2d Cir. 2001)). In opposition to plaintiff’s motion and in support of their cross-motion for summary judgment, defendants argue that Jetmax is not the valid owner of the ‘587 Copyright Registration and that the Tear Drop Light Set is

not copyrightable because it is a useful article and because it lacks originality. (Dfs.’ Mem. in Supp. at 4-5.) As discussed below, the Court concludes that the Tear Drop Light Set is potentially eligible for copyright protection because its decorative covers “can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” See 17 U.S.C. § 101. However, the Court also finds that there are genuine disputes of material facts concerning whether Jetmax is the valid owner of the ‘587 Copyright Registration and whether the Tear Drop Light Set is sufficiently original. Accordingly, summary judgment on these issues is inappropriate.

A. Ownership

Jetmax claims that it is the owner of the ‘587 Copyright Registration because it has produced the ‘587 Copyright Registration that lists Jetmax as the “author.” (Pl.’s Mem. in Supp. at 9.) The Copyright Act provides that “[i]n any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.” 17 U.S.C. § 410(c).

“However, ‘a certificate of registration creates no irrebuttable presumption of copyright validity,’ and ‘where other evidence in the record casts doubt on the question, validity will not be assumed.’” Urbont, 831 F.3d at 89 (quoting Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc., 342 F.3d 149, 166 (2d Cir. 2003)).

While Jetmax bears the burden of proving copyright ownership, defendants—as the

party challenging the validity of the copyright registration—have the burden of proving that the ‘587 Copyright Registration is invalid. Id.

In its complaint, Jetmax alleges that “[t]he Tear Drop Light Set was designed in 2004 by an employee of Jetmax in the scope of their employment as work for hire.” (Compl. ¶ 14; see also Declaration of Stephen Cheung in Support of Plaintiff’s Motion for Summary Judgment of Willful Copyright Infringement (“Cheung Decl.”) ¶ 16, ECF No. 37.) Plaintiff acknowledges that the designer was paid by a company called Winners Manufacturing. (See Defs.’ 56.1 Resp. ¶ 25.) In support of its instant motion, Jetmax states that “[u]nder Chinese law, only Chinese entities are allowed to have employees based in mainland-China” and therefore “Winners Manufacturing (‘Winners’), a Chinese corporation . . . serves as an intermediary employer for employees working for Jetmax in mainland-China.” (Cheung Decl. ¶¶ 6-7.)

Under the Copyright Act, “an ‘employer’ who hires another to create a copyrightable work is the ‘author’ of the work for purposes of the statute, absent an agreement to the contrary.” Playboy Enterprises, Inc. v. Dumas, 53 F.3d 549, 554 (2d Cir. 1995); see Urbont, 831 F.3d at 89. “Because the statute does not define ‘employer’ or ‘author,’ courts apply what is known as the ‘instance and expense test.’” Urbont, 831 F.3d at 89. “As a general rule, [a] work is made at the hiring party’s ‘instance and expense’ when the employer induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out.” Id. (citations and internal quotation marks omitted).

Here, the Court concludes that there are genuine disputes of material facts concerning whether the Tear Drop Light Set was made at Jetmax's "instance and expense." For example, during the deposition of Jetmax's owner and operator Stephen Cheung, Cheung appeared to suggest that the design employees in mainland China were paid and employed by Winners. (See Lazarus Aff. Ex. D, ECF No. 43-6.) In addition, defendants argue with some force that plaintiff improperly failed to disclose the existence of was Winners in its initial Rule 26 disclosures and have failed to sufficiently produce responsive documents concerning Winners. (See Dfs.' Mem. in Supp. at 13-72.) In short, there are triable issues of fact and whether plaintiff is the valid owner of the '587 Copyright Registration cannot be decided on summary judgment.

B. Separability

The Copyright Act provides protection for "pictorial, graphic, or sculptural features" of the "design of a useful article" only if those features "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. §§ 101, 102(a). A useful article is defined as "article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." Id. § 101. Here, the parties do not dispute that the Tear Drop Light Set is a useful article insofar as it serves the "intrinsic utilitarian function" or providing light to a room. Rather, the parties strongly disagree regarding whether the Tear Drop Light Set contains artistic elements that are sufficiently separable in order to merit copyright protection.

Having carefully considered this question, the Court finds that the Tear Drop Light Set does contain artistic elements—the decorative covers—that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

After the parties' cross-motions became fully briefed, the Supreme Court issued its decision in Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017), which resolved widespread disagreement over the proper test for determining whether the design of a useful article is entitled to copyright protection. As noted above, the Court requested and received supplemental briefing from the parties analyzing the impact, if any, of Star Athletica on the pending motions.

In Star Athletica, respondents Varsity Brands, Inc. and certain affiliates (collectively "Varsity")—companies that design and manufacture cheerleading uniforms and other athletic apparel and accessories—sued petitioner Star Athletica, LLC, a competitor, claiming in relevant part that Star Athletica infringed five of Varsity's copyrighted designs. See Star Athletica, 137 S. Ct. at 1007-08. The designs, which appear on the surface of cheerleading uniforms and other garments, were mostly arrangements and combinations of lines, colors, shapes, stripes, and chevrons. See id. at 107. The United States District Court for the Western District of Tennessee granted summary judgment to Star Athletica on Varsity's copyright infringement claim, holding that Varsity's designs did not qualify as protectable pictorial, graphic, or sculptural works because they served the useful, or

“utilitarian,” function of identifying the garments as “cheerleading uniforms” and therefore could not be “physically or conceptually” separated under Section 101 of the Act “from the utilitarian function” of the uniform. See id. at 1007-08. The Court of appeals for the Sixth Circuit reversed. See id. at 1008.

The Supreme Court “granted certiorari to resolve widespread disagreement over the proper test for implementing § 101’s separate-identification and independent-existence requirements.” Id. at 1007. The Supreme Court held “that a feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” Id.

In establishing this new test, the Supreme Court rejected various forms of previously applied separability analysis, including analysis initially relied on by the parties on the instant motions. The Supreme Court clarified that it is no longer important whether an artistic element was originally incorporated into a useful article or created independently, id. at 1011, and that a useful article need not be equally or similarly useful once the artistic element is removed, id. at 1013-14. Similarly, a party need not show that the extracted element is solely artistic, that it was designed free from considerations of utility, or that it would be marketable once separated. Id. at 1013-15. Finally, the Supreme Court abandoned the physical-

conceptual separability distinction, stating that the statute’s separability analysis is “a conceptual undertaking.” Id. at 1014.

Applying the test to the cheerleading uniforms at issue, the Court determined that the two-dimensional design features were separable elements available for copyright protection. Id. at 1012. Each prong of the Court’s test was met as (1) the colors, stripes, and chevrons could be identified as “features having pictorial, graphic, or sculptural qualities”; and (2) those elements, when imagined separately and applied to another medium, would qualify as “two-dimensional . . . works of . . . art.” Id. (quoting 17 U.S.C. § 101).

Applying the two-part test from Star Athletica here, the Court determines that the decorative covers of the Tear Drop Light Set “can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the [Tear Drop Light Set].” 17 U.S.C. § 101; Star Athletica, 137 S. Ct. at 1008. As the Supreme Court explained, “[t]he first requirement—separate identification—is not onerous. The decisionmaker need only be able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities.” Star Athletica, 137 S. Ct. at 1010. The Tear Drop Light Set undoubtedly has three-dimensional decorative covers that have sculptural qualities. The second “independent-existence requirement is ordinarily more difficult to satisfy. The decisionmaker must determine that the separately identified feature has the capacity to exist apart from the utilitarian aspects of the article.” Id. Again, this requirement is satisfied in this case. The decorative covers are

sculptural works that are capable of existing apart from the utilitarian aspect of the light set, i.e. the light bulbs and other components that cause the Tear Drop Light Set to light a room.² The primary purpose of the cover is artistic; once the covers are removed, the remainder is a functioning but unadorned light string.



C. Originality

As noted above, in order to prove a claim of copyright infringement, Jetmax must also show that the constituent elements of the work at issue (the decorative covers of the Tear Drop Light Set) are original. See Urbont, 831 F.3d at 88. To prove that a work is original, “it must be independently created by the author and possess ‘at least some minimal degree of creativity.’” Scholz Design, Inc. v. Sard Custom Homes, LLC, 691 F.3d 182, 186 (2d Cir. 2012) (quoting Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)). The Court notes that “the requisite level of creativity is extremely low.” Feist, 499 U.S. at 345. While it appears to the

² Even if the covers reduce glare and serve some utilitarian function, the Supreme Court explained that the imagined remainder of the article “left behind” once the pictorial, graphical, or sculptural element is removed need not “be a fully functioning useful article at all, much less an equally useful one.” Star Athletica, 137 S. Ct. at 1014.

Court that the Tear Drop Light set is likely original, the Court determines that there are nevertheless genuine disputes of material fact exist on this issue and the Court reserves its judgment on this issue for trial.

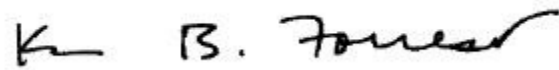
IV. CONCLUSION

For the aforementioned reasons, plaintiff's motion for summary judgment is DENIED and defendants' cross-motion for summary judgment is also DENIED. The Court will issue a separate order forthwith setting a near-in trial schedule for this action.

The Clerk of Court is directed to terminate the motions at ECF Nos. 34, 42.

SO ORDERED.

Dated: New York, New York
August 28, 2017

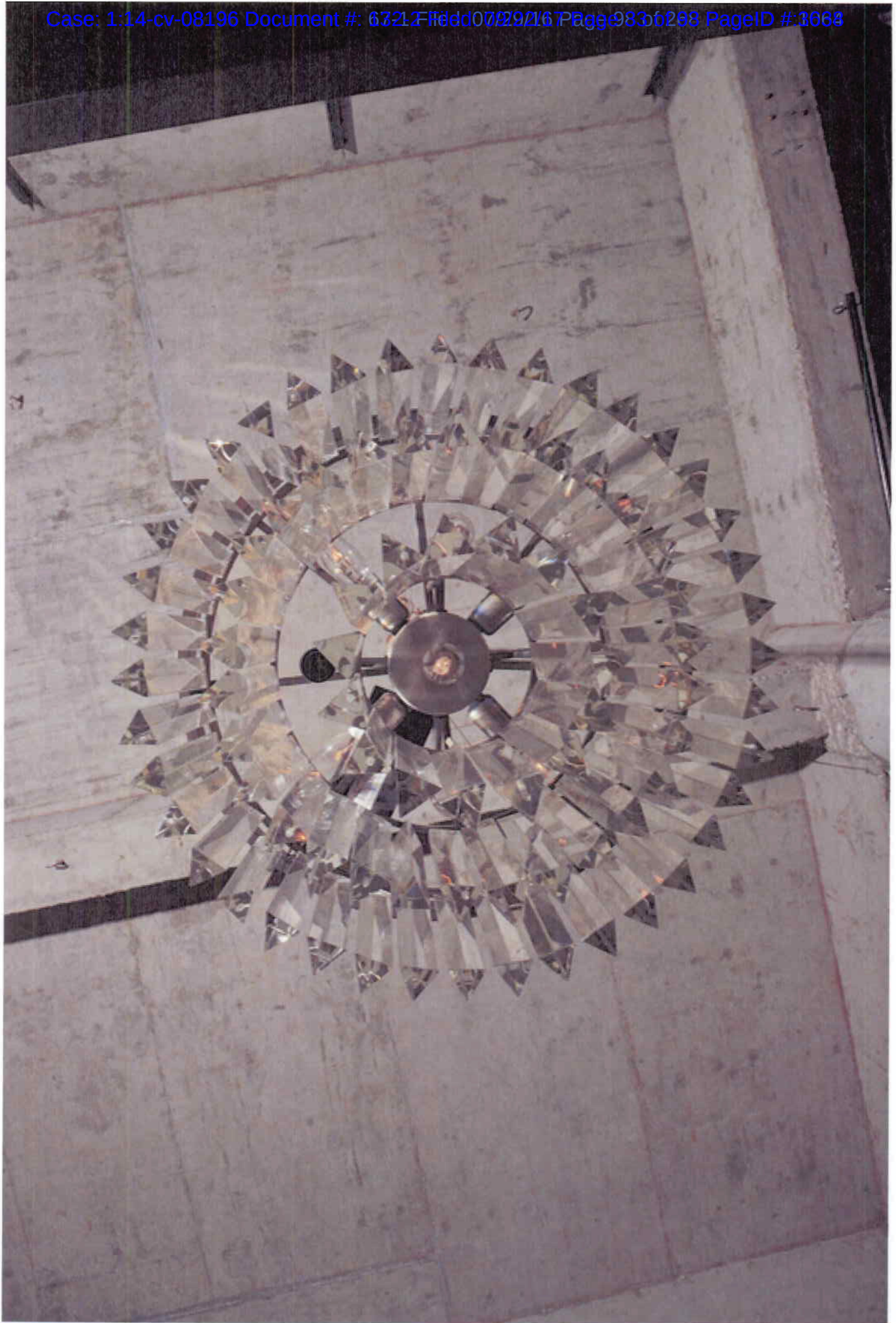


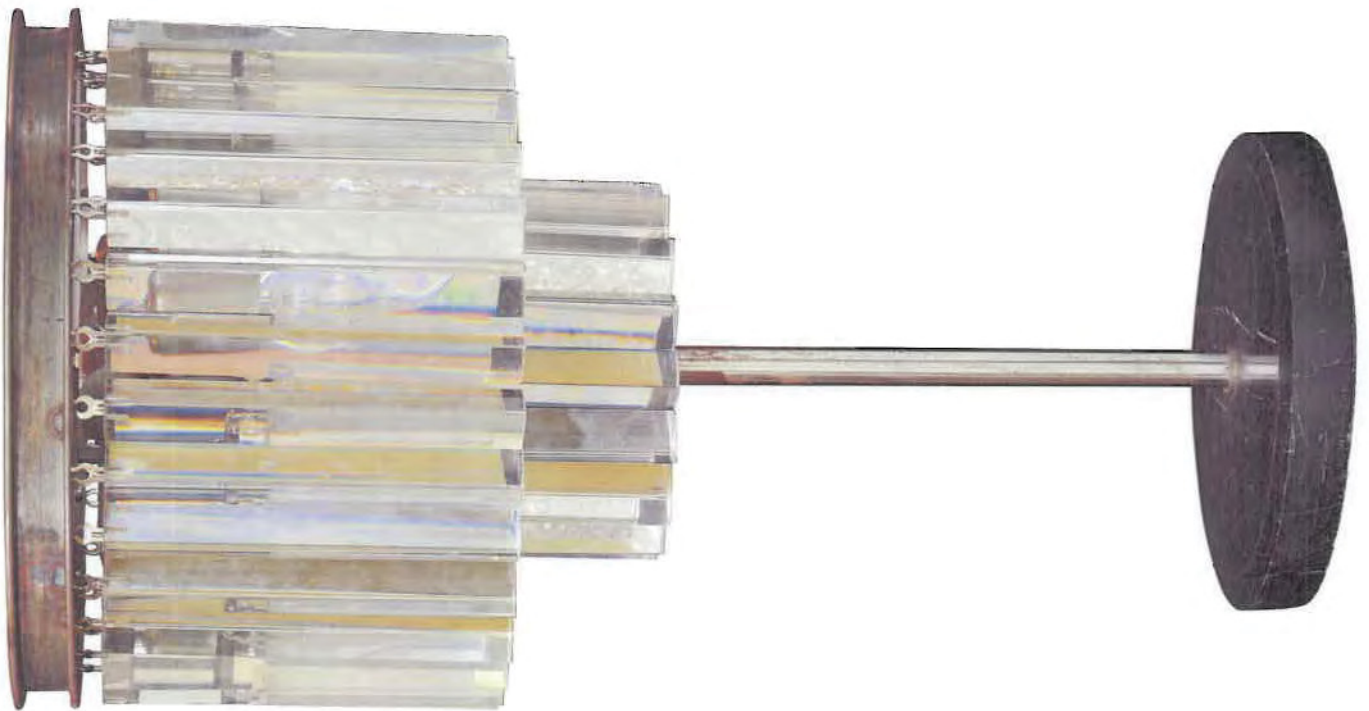
KATHERINE B. FORREST
United States District Judge

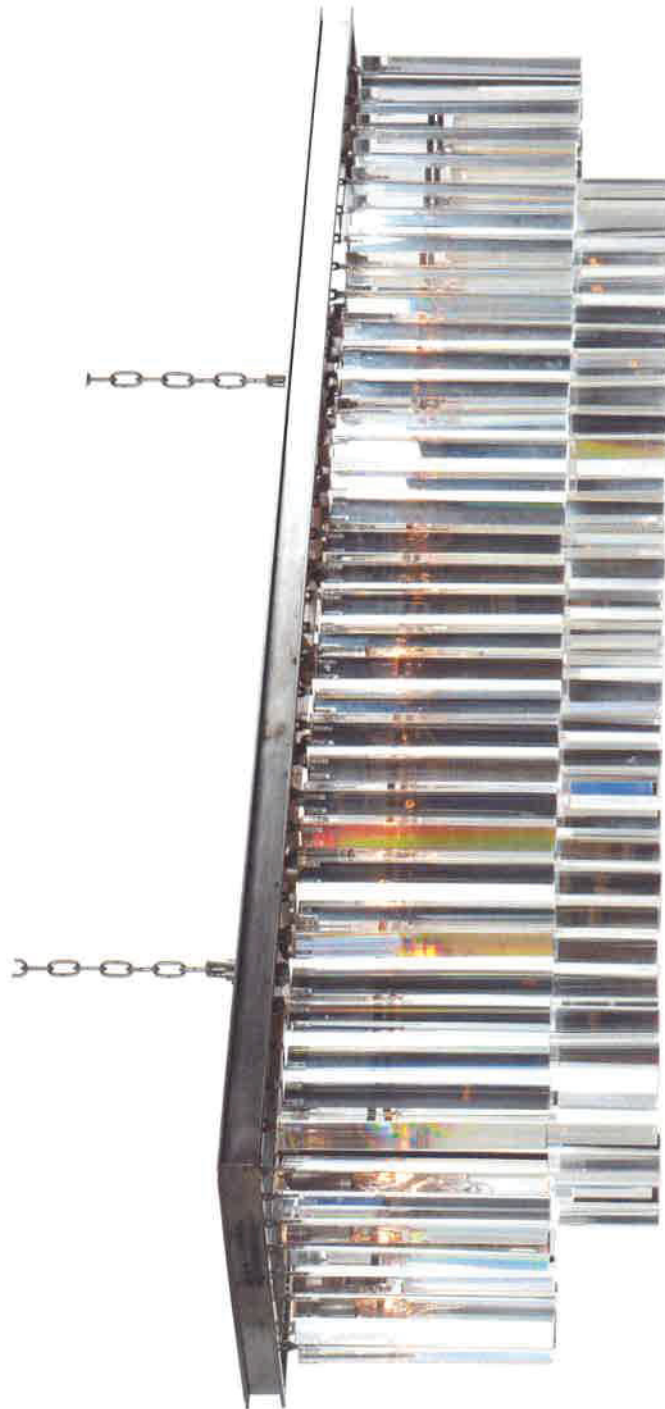
EXHIBIT E











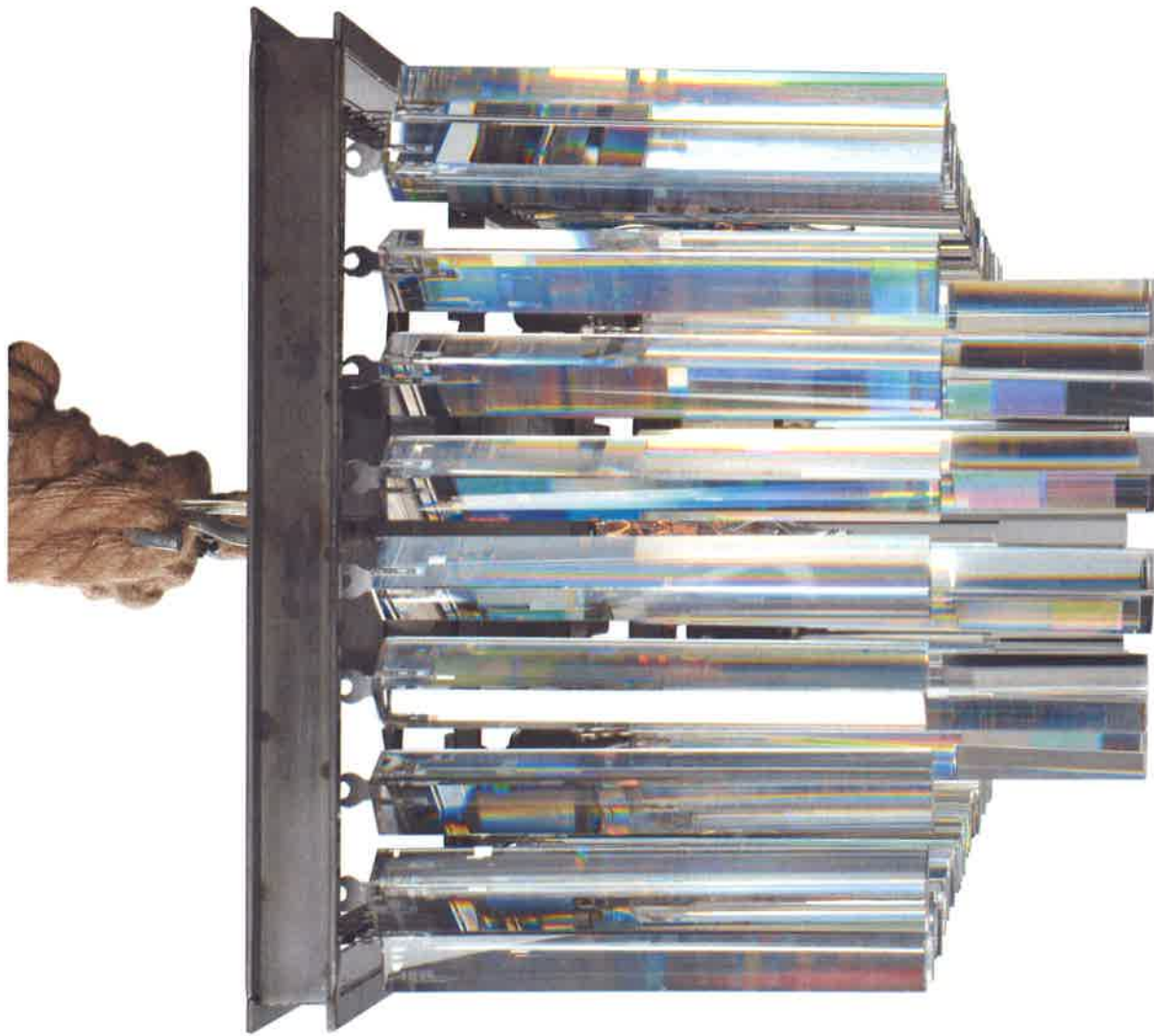


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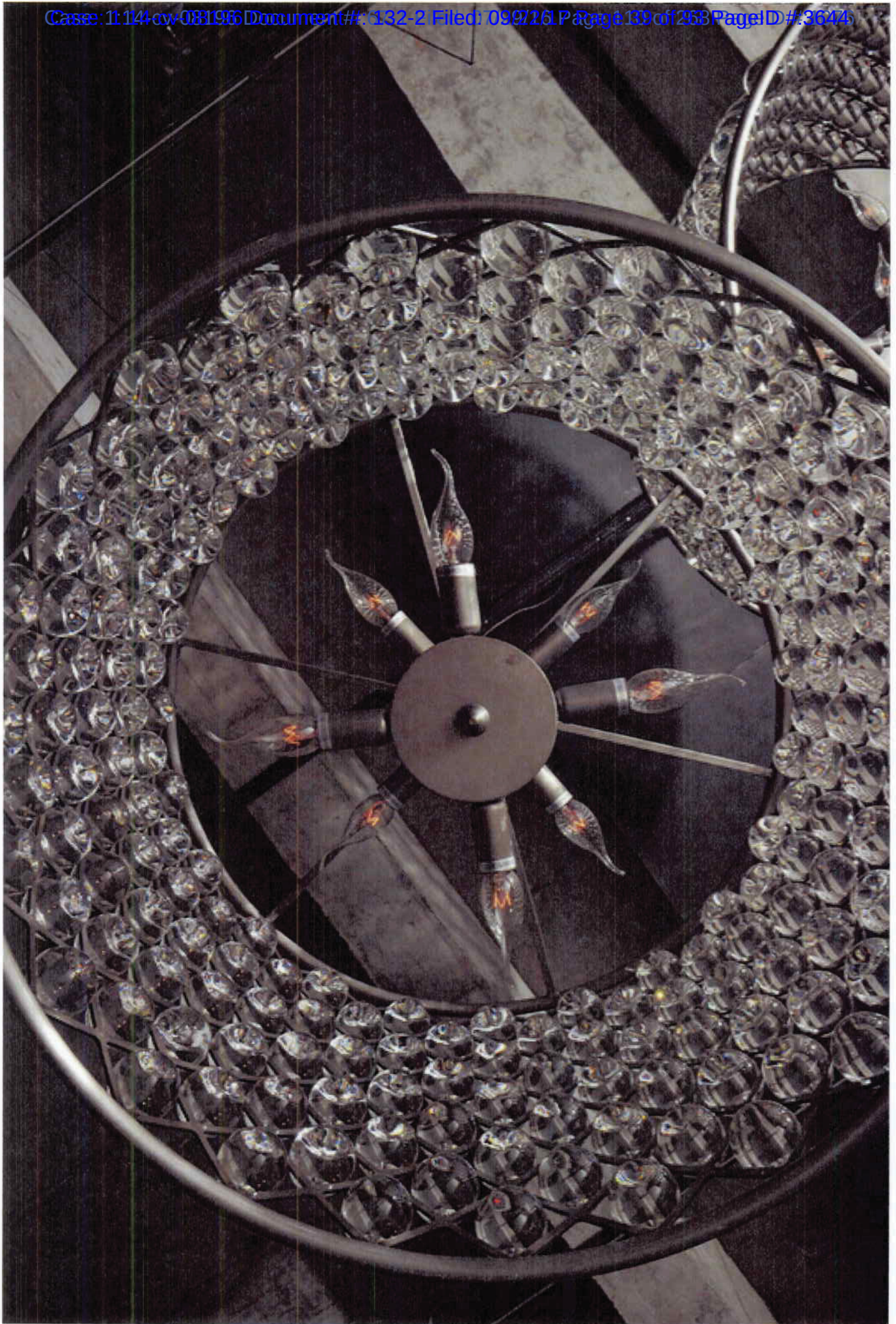


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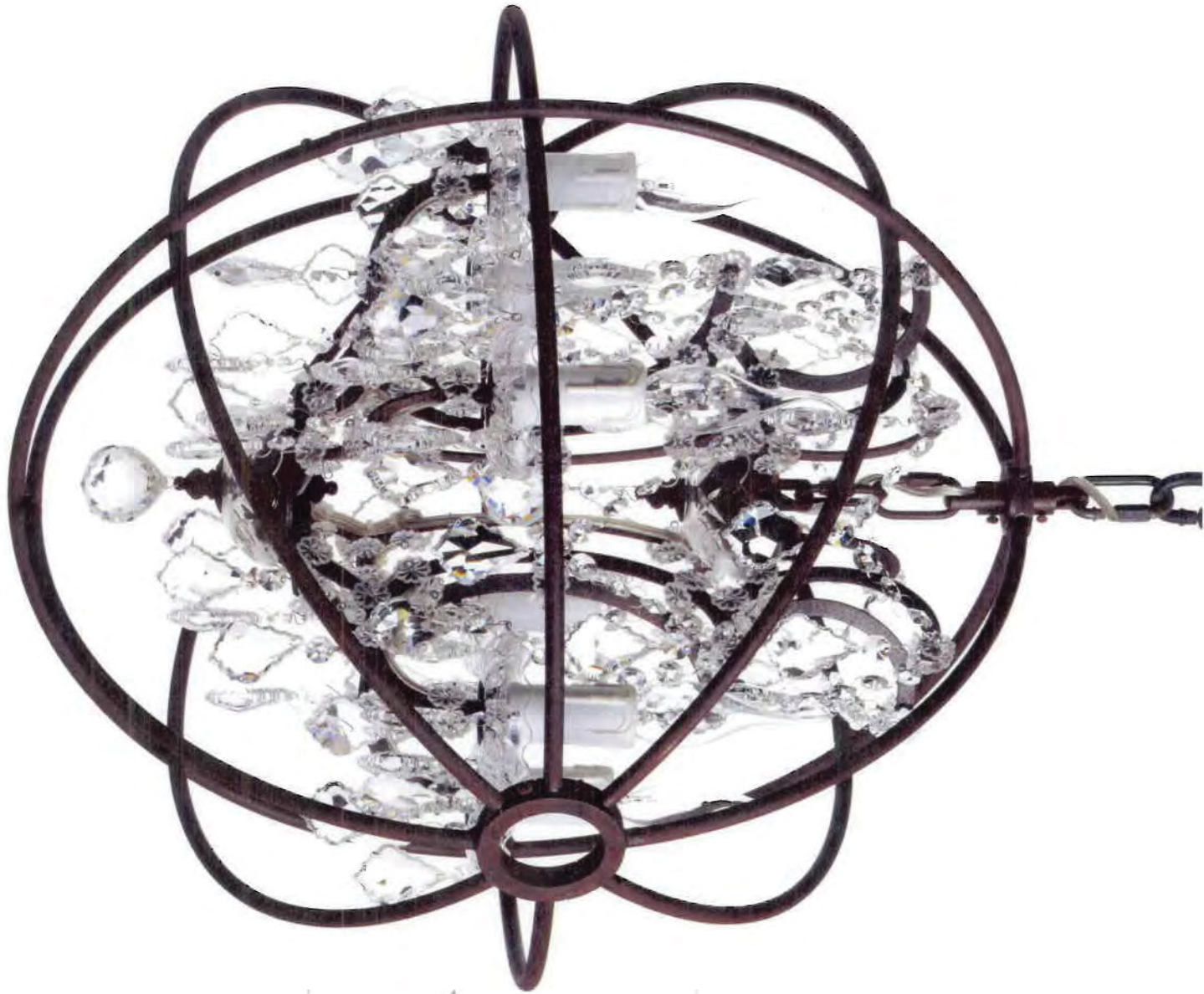
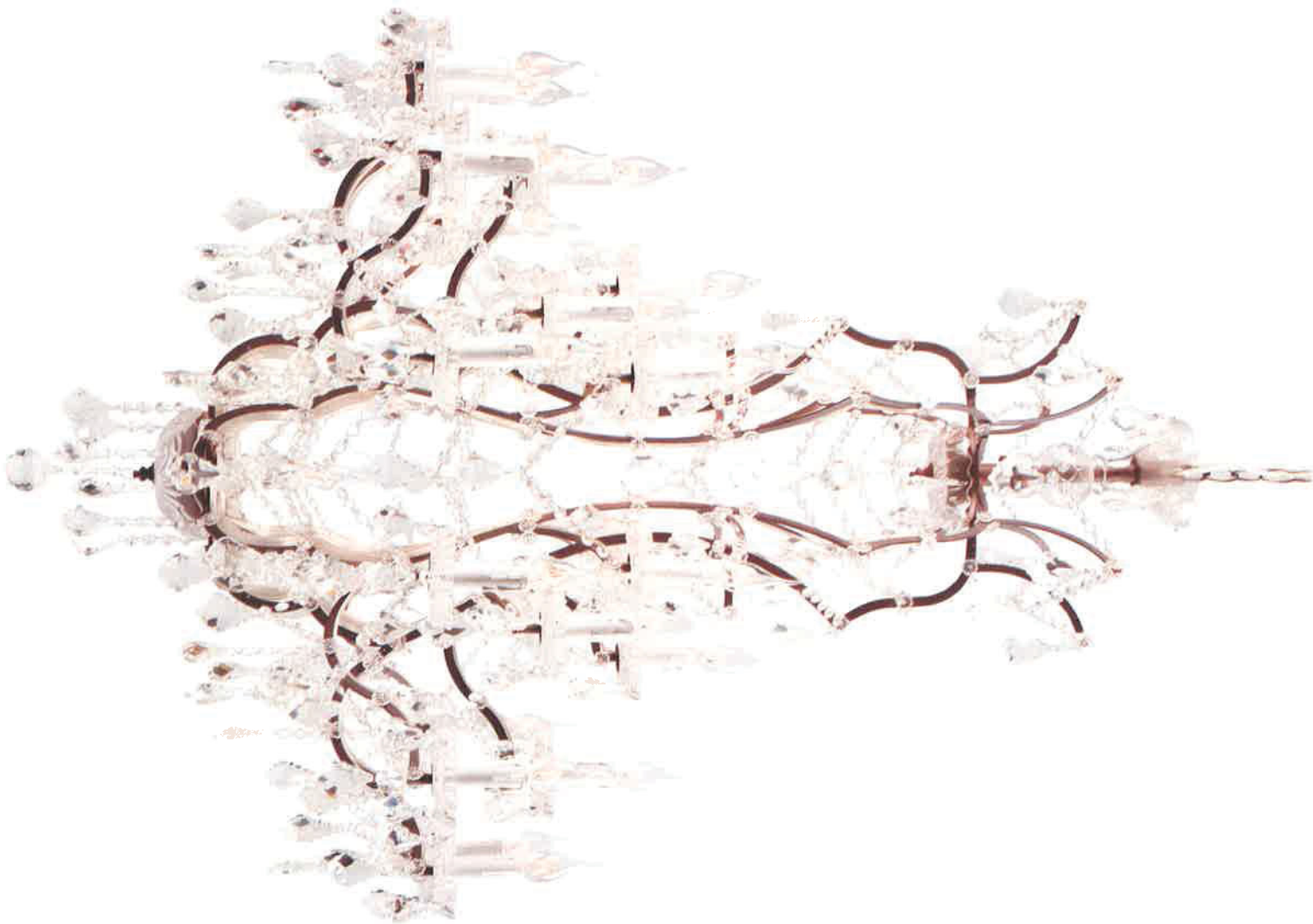




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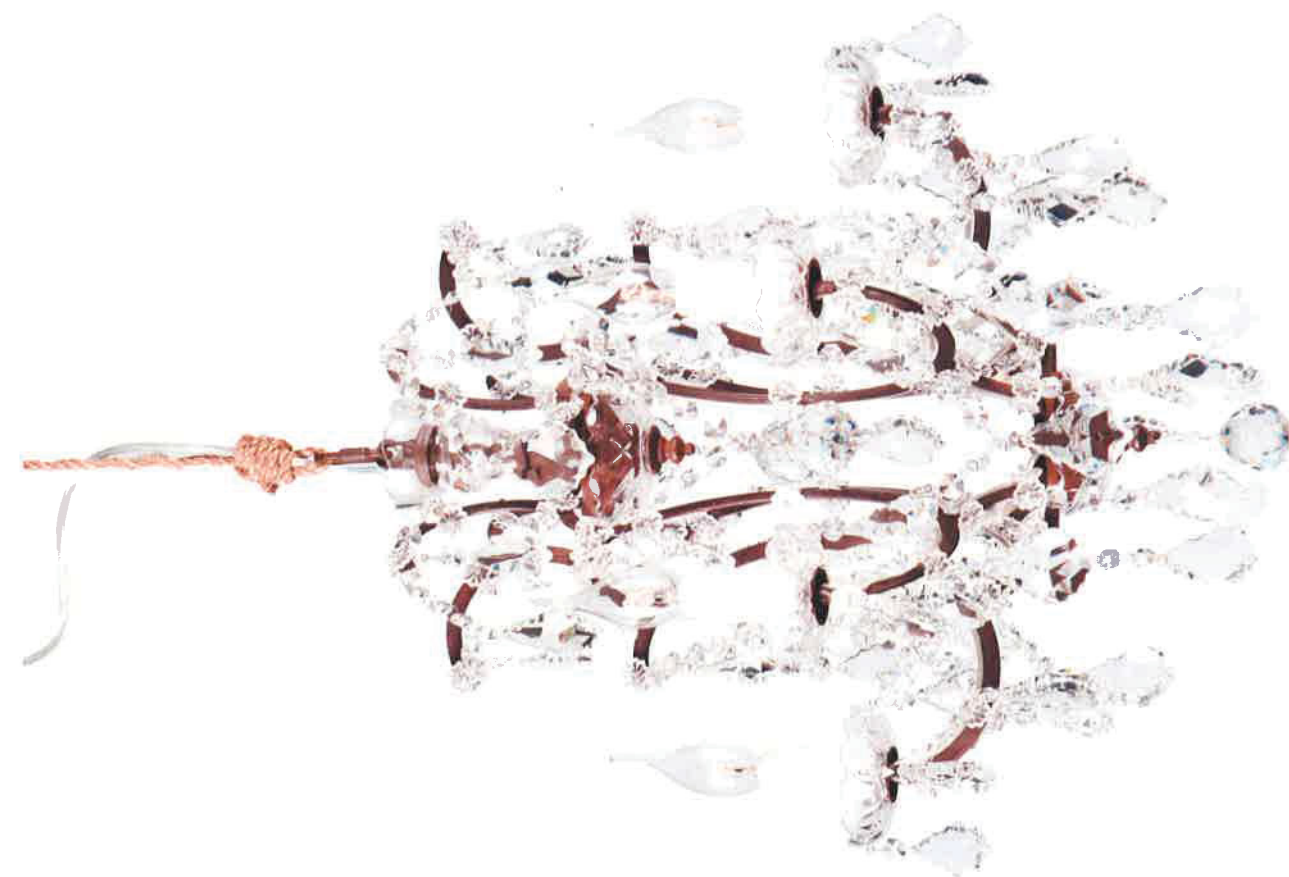


EXHIBIT I







EXHIBIT J





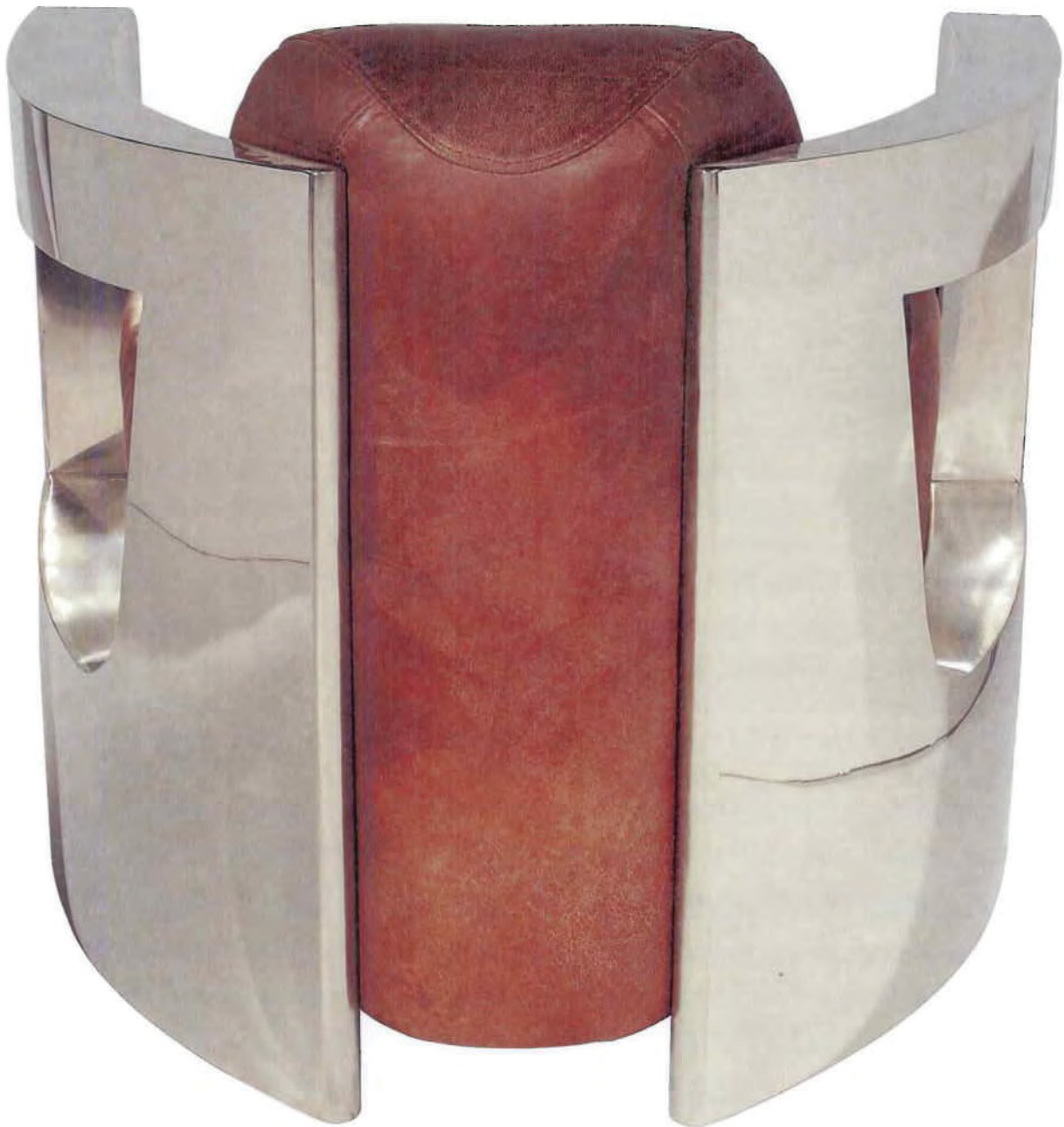


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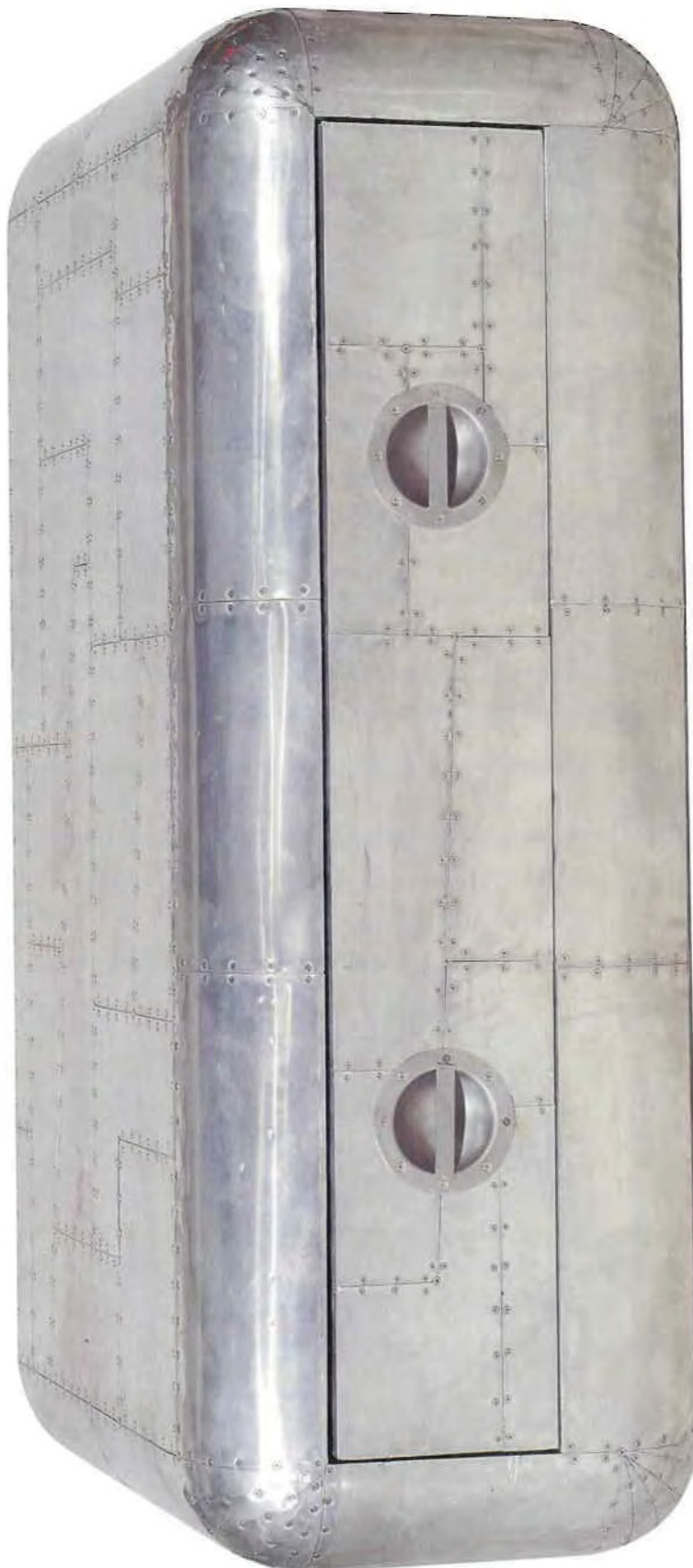


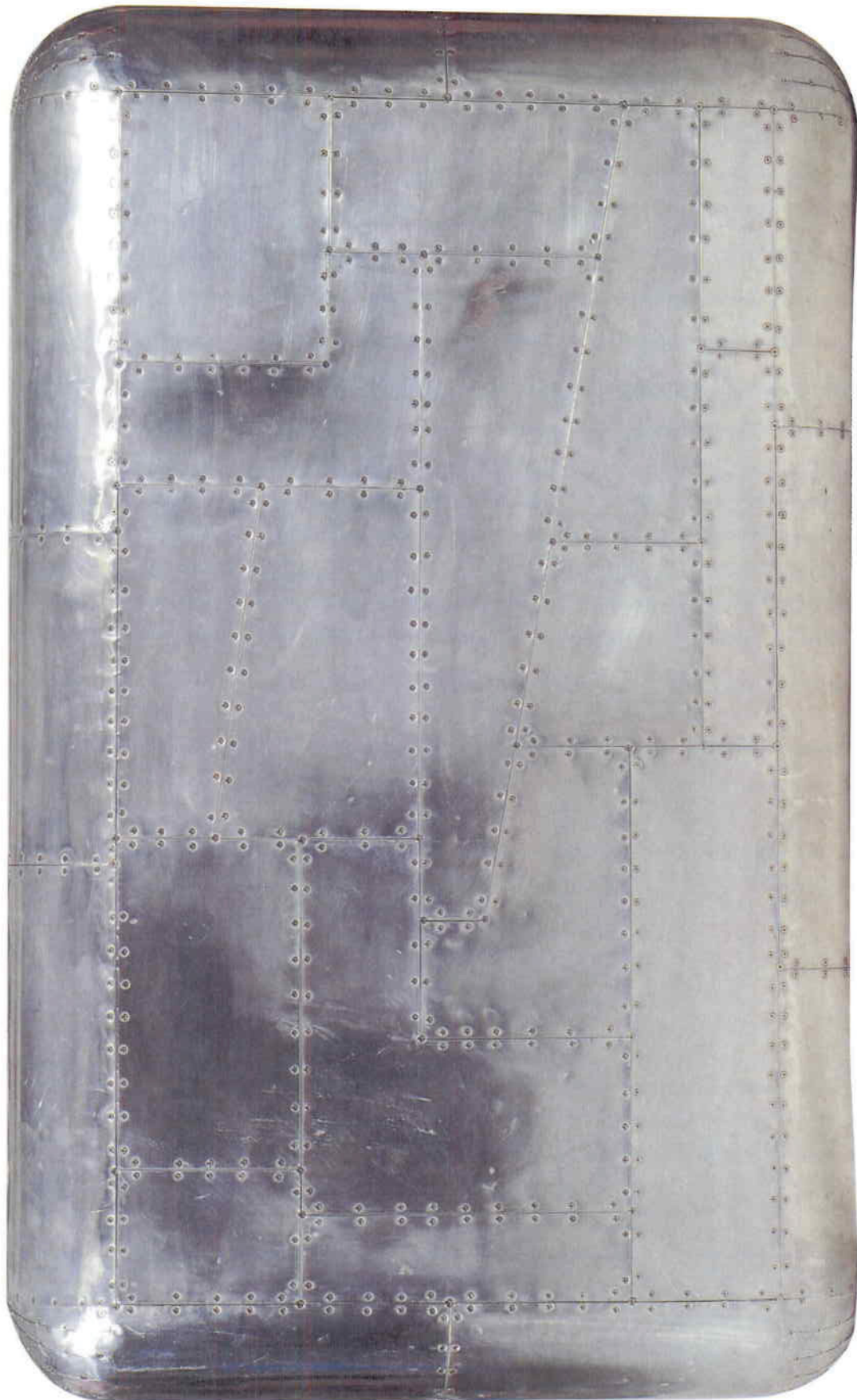






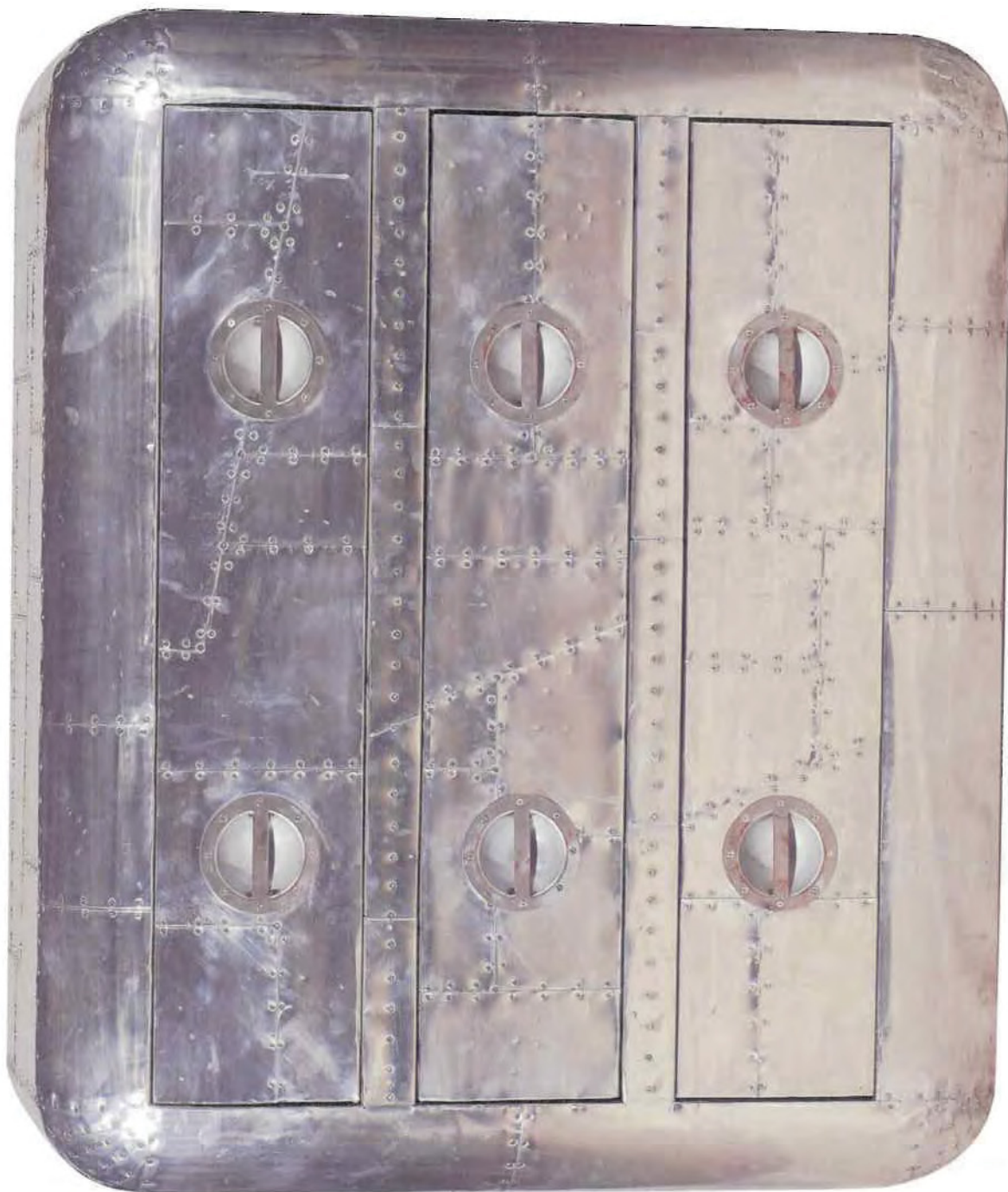
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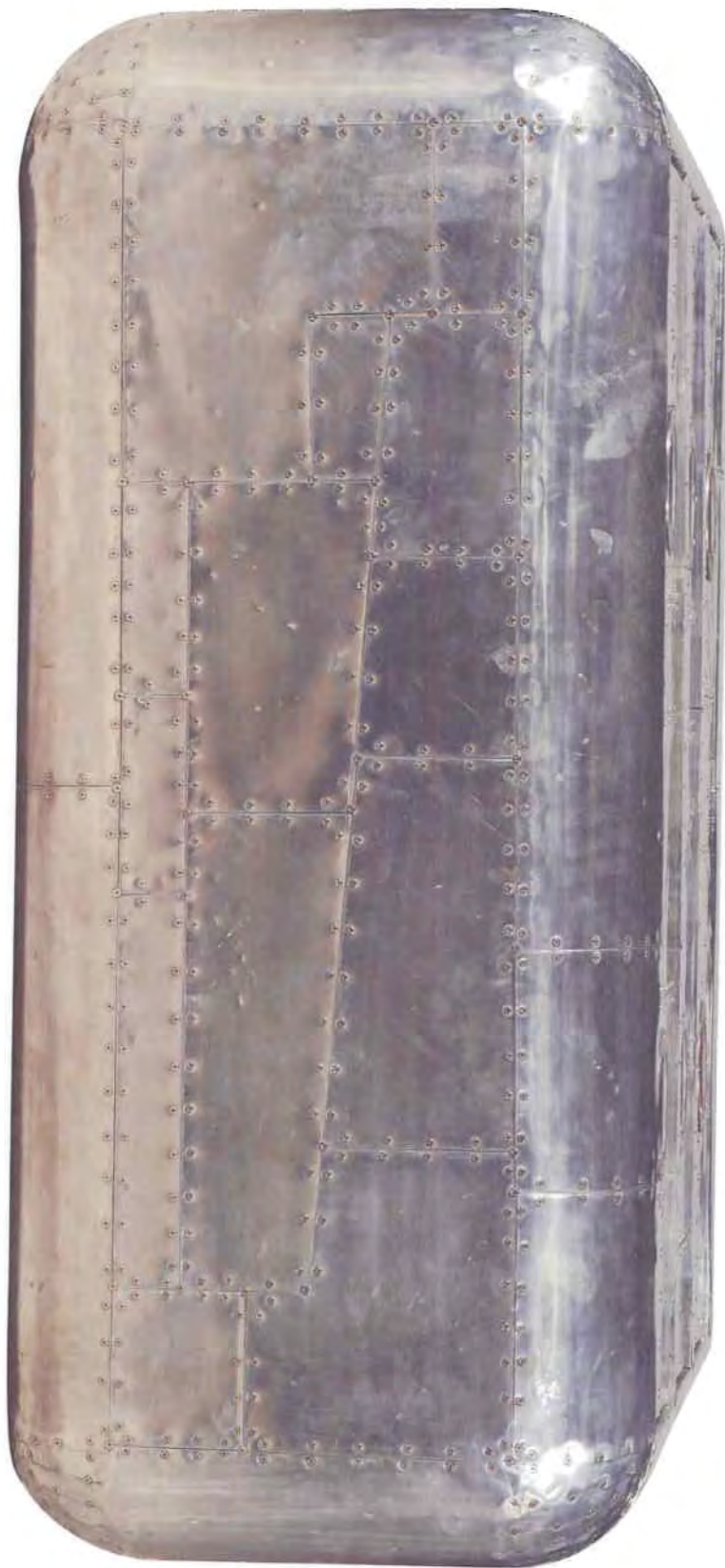


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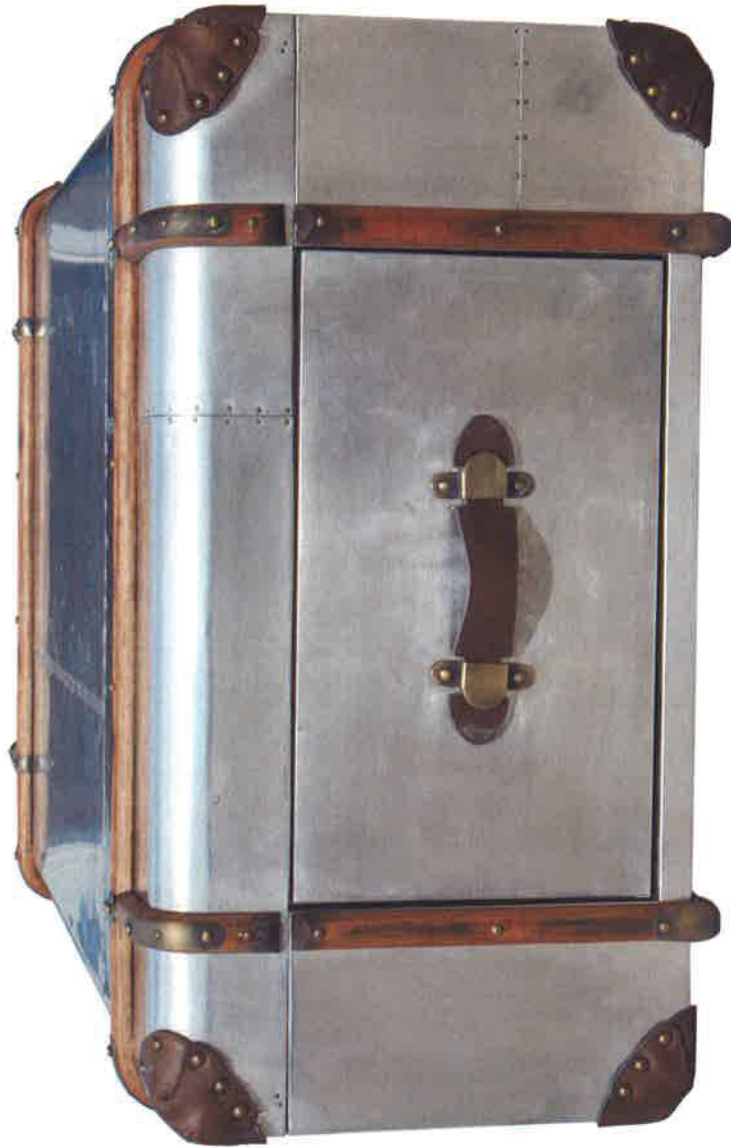
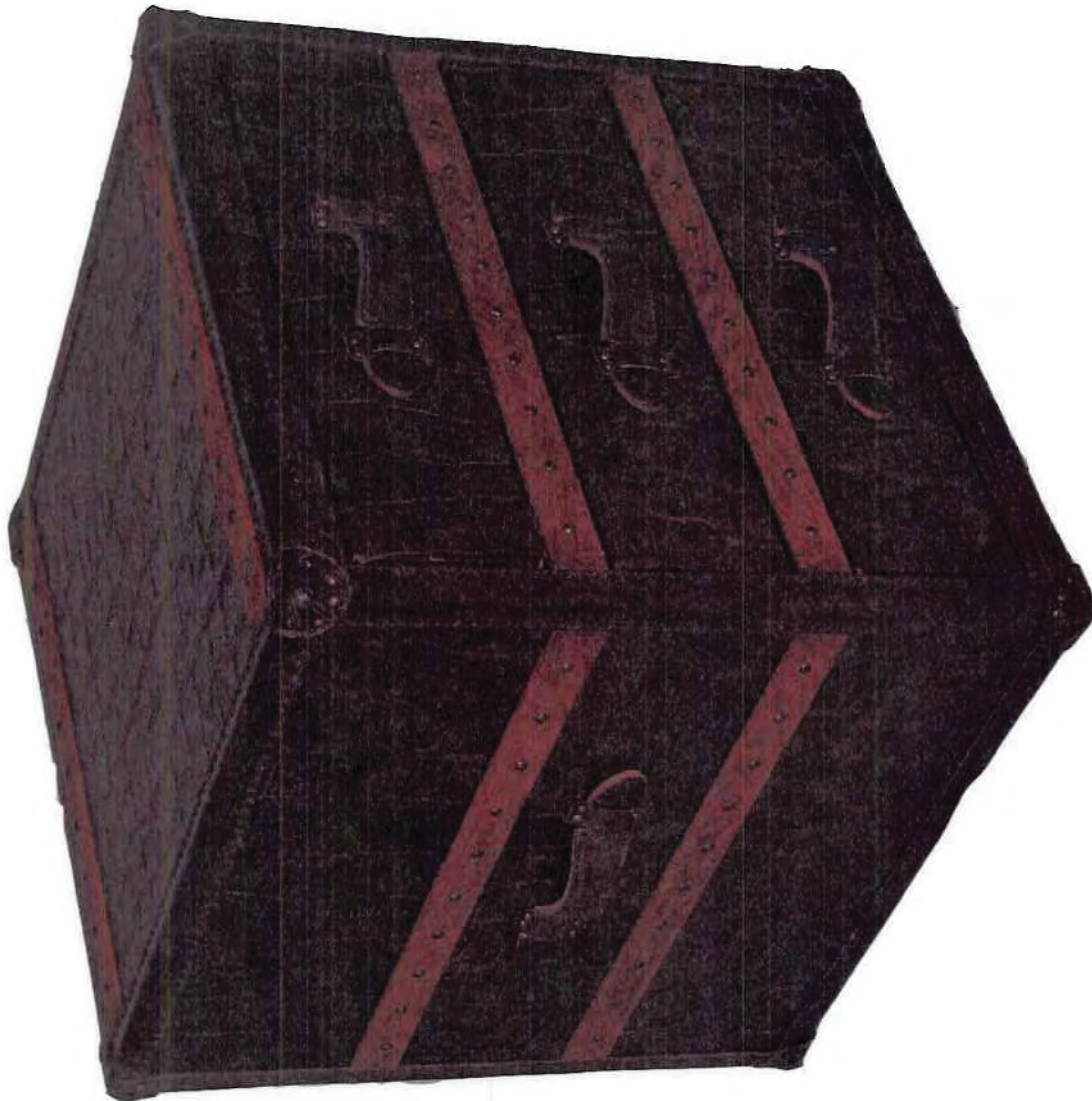


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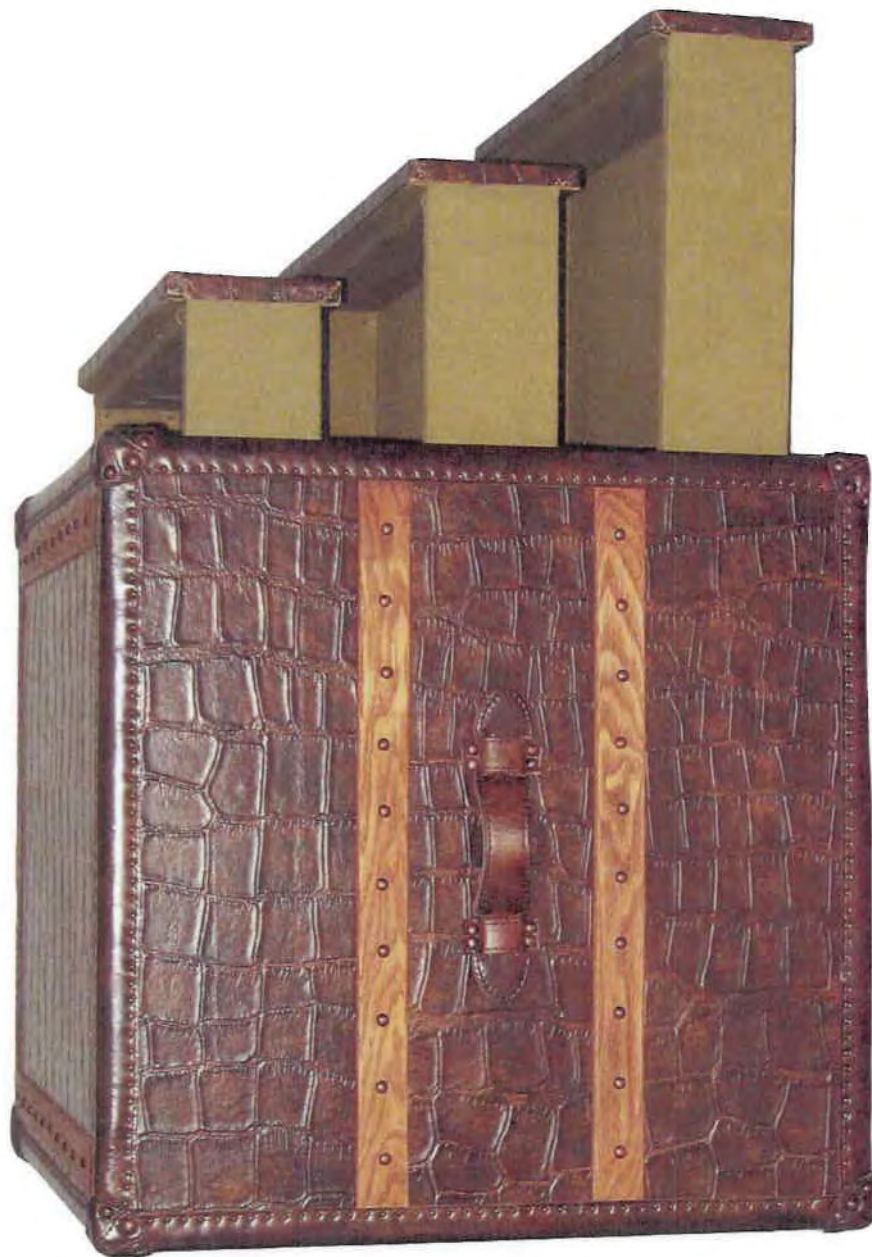






EXHIBIT O

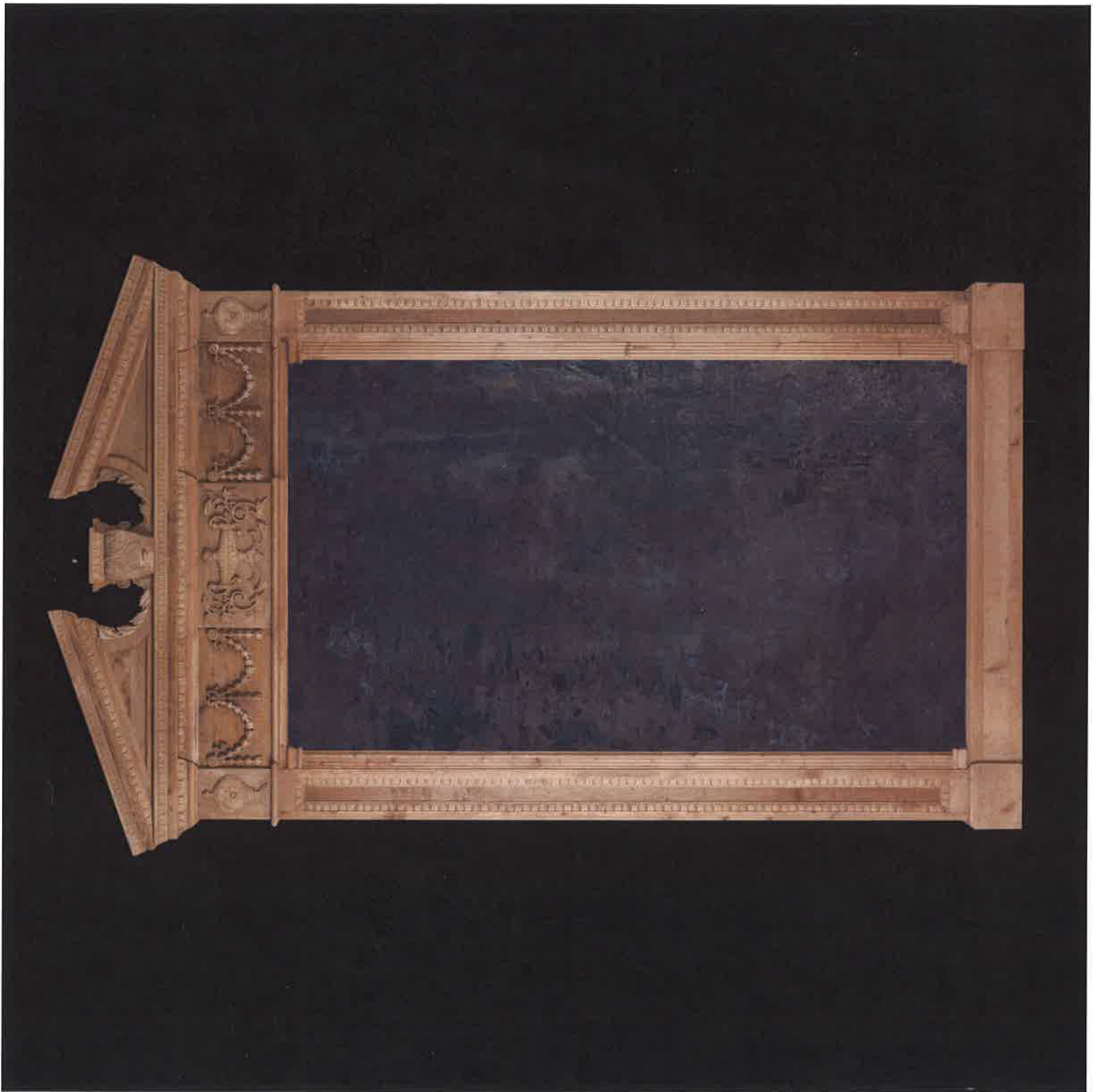


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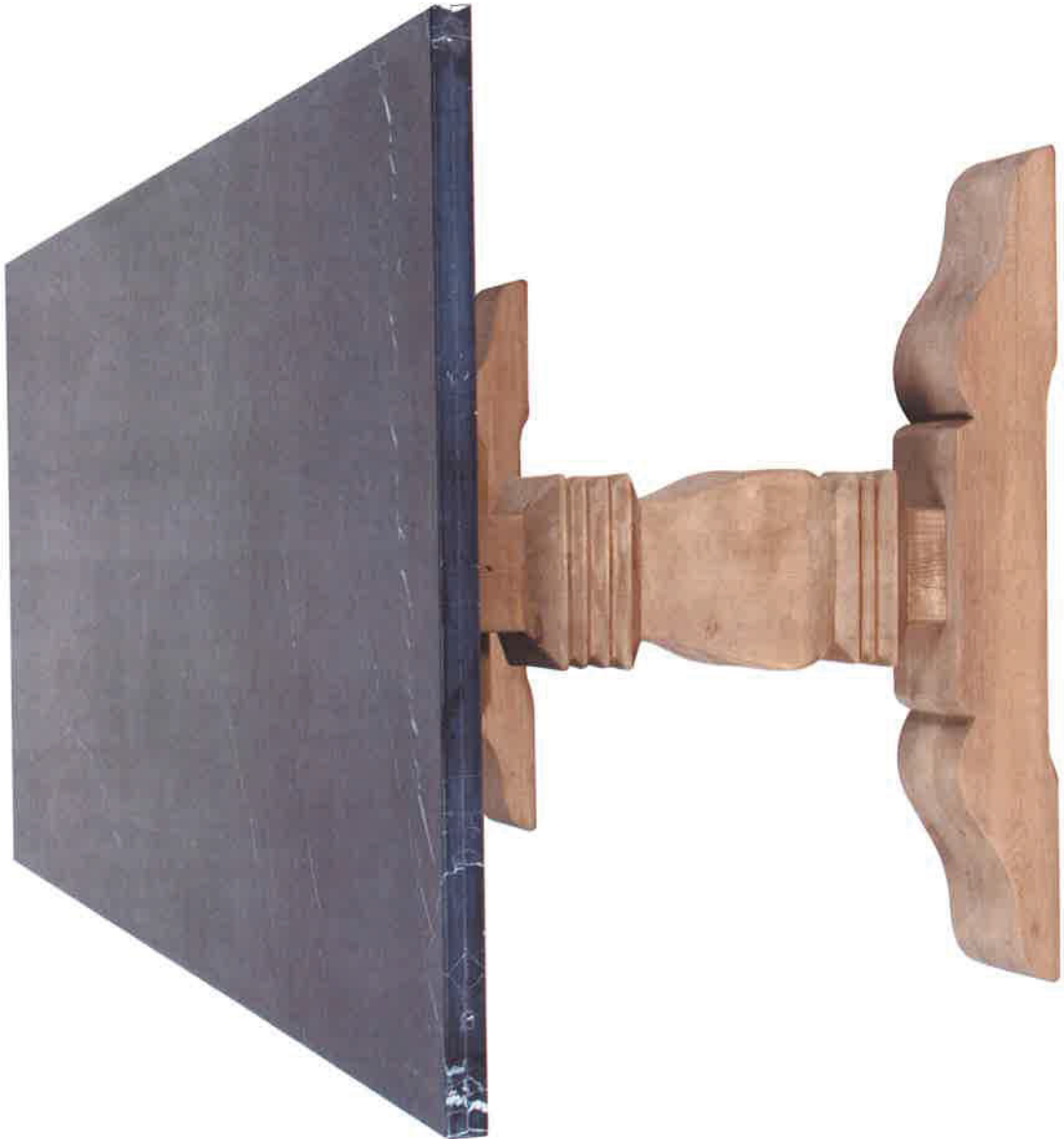


EXHIBIT Q







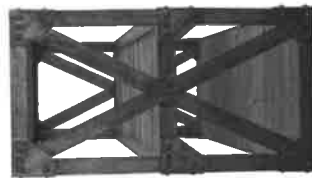




EXHIBIT R







